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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1146

PAUL BRADLEY, WILLIAM COUSINS, PATRICK J. HUGHES, RONALD C. SMITH, CHARLOTTE ADELMAN, SHELVIN SINGER,

Plaintiffs-Appellants,

vs.

FRANKLIN J. LUNDING, JR., Chairman, State Board of Elections, WILLIAM L. HARRIS, Vice Chairman, DON W. ADAMS, MICHAEL E. LAVELLE and JAYNE PRICE, Chief Clerk,

Defendants-Appellees,

JOHN A. McELLIGOTT, AUBREY F. KAPLAN, ARTHUR J. CIESLIK, JEROME LERNER, FRANCIS J. MAHON, HOWARD M. MILLER, MARILYN ROZMAREK KOMOSA, ADAM N. STILLO, R. EUGENE PINCHAM, MARY ANN GROHWIN McMORROW, RICHARD L. SAMUELS, GERALD L. SBARBORO, THEODORE M. SWAIN, ANTHONY J. SCOTILLO, JAMES A. ZAFIRATOS, JOHN H. McCOLLOM, SYLVESTER C. CLOSE, WILLIAM E. PETERSON, JOHN F. REYNOLDS, RAYMOND S. SARNOW, RAYMOND C. SODINI, JAMES TRAINA, JOSE R. VAZQUEZ, RUDOLPH L. JANEGA and WARREN D. WOLFSON,

Intervening Defendants-Appellees.

Appeal from the Supreme Court of Illinois

MOTION TO DISMISS OR AFFIRM

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NOW COMES the Defendants-Appellees in the above-entitled cause, and respectfully move this Honorable Court, pursuant to Rule 16 of the Rules of the Supreme Court of the United States to dismiss the appeal on the ground that the question does not present a substantial federal question, or alternatively, that the judgment of the Illinois Supreme Court be affirmed since it is predicated on substantial judicial precedent.

OPINION BELOW

The opinion of the Supreme Court of Illinois is appended to the Jurisdictional Statement.

STATEMENT OF THE CASE

The question on appeal is the constitutionality of Regulation 1975-2 of the Illinois State Board of Elections (Appendix). The Regulation has been attacked as denying Plaintiffs due process, equal protection and political rights as guaranteed by the Constitution of the United States.

Plaintiffs sought to have Regulation 1975-2 declared unconstitutional, and to enjoin its enforcement. The Circuit Court of Sangamon County declared it to be unconstitutional and on appeal, the Illinois Supreme Court reversed and remanded the cause to the Circuit Court of Sangamon County with directions to dismiss the complaint.

Plaintiffs filed a Notice of Appeal to the Supreme Court of the United States and a Jurisdictional Statement.

ARGUMENT

I.

THE QUESTION PRESENTED DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The purpose of Regulation 1975-2 of the State Board of Elections is to provide a non-discriminatory and fair method of determining the order of filings of petitions where simultaneous filings have occurred. The method of determining which of simultaneously filed petitions to be listed first is by lottery. The Regulation, as a consequence, provides an equal and fair opportunity to all candidates to obtain optimum ballot position. The Regulation permits candidates to file group petitions or to file single petitions.

This Honorable Court has held that the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, does not make every minor difference in the application of laws to non-homogeneous groups a violation of the Constitution. In determining whether or not state action violates the Equal Protection Clause, a Court must consider the facts and circumstances behind the law, the interest which the state claims to be protecting, and a balancing of the interests of those who may be disadvantaged by the classification. See *William* v. *Rhodes,* 393 U.S. 23 (1968).

Permitting slates of candidates to affiliate together by listing them on the ballot as a group is beneficial to the voter for it increases voter identification on the candidates so affiliated. A ballot should be arranged to allow a voter to intelligently select those candidates of his choice; not to mislead them. Where this can be achieved without arbi-

trarily giving some candidates preferential ballot positions, a legitimate state interest is served.

The right of association has long been recognized by this court as an inherent constitutional right. *Cousins* v. *Wigoda,* 95 S. Ct. 541 (1975), *Kusper* v. *Pontakes,* 414 U.S. 51 (1973).

In *Cousins,* the court citing *Kusper,* stated (547):

> "The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom."

Laws of other jurisdictions permitting slates of candidates to appear together on the ballot have been consistently sanctioned by the courts.

In *McCoy* v. *Mayer,* 333 F. 2d 151, (C.A., D.C., 1964), the Court upheld the validity of a Regulation enacted by the Board of Elections of the District of Columbia which provided for a lottery, wherein a single candidate was in competition with a group of candidates listed on one petition. This regulation provided that the names of candidates nominated as a slate shall be listed on the ballot in the same order in which their names appear on the first page of their nominating petitions. The regulation further provided that the order in which the names and slates of candidates for office appear on the ballot shall be determined by a lottery.

In *Quaremba* v. *Allen,* 334 A. 2d, the Superior Court of New Jersey, 1975, held that the statute, requiring that members of a group of primary candidates who file a joint petition be placed on the same line of voting machine, did not violate the constitutional rights of candidates who did not file joint petitions.

Candidates appearing as a slate have a fundamental constitutional right of free political association. There is a legitimate interest of the state in protecting the rights of these candidates, as well as the signers of nominating petitions for such candidates to appear together on the ballot. In *Farrington* v. *Falcey,* 233 A. 2d 185 (Superior Court of New Jersey, Appellate Division, 1967), the court held a political parties' regularly designated candidates filing joint nominating petitions for a primary election have a right to appear jointly on the ballot.

Regulation 1975-2 of the State Board of Elections neither promotes nor discourages the slating of candidates but is objectively neutral. The candidates' election to file separate or group petitions is made by them voluntarily, by their own free and deliberate choice.

The State Board of Elections, through its interpretation and application of the various statutory provisions, case decisions and the adoption and promulgation of Regulation 1975-2, have provided a method whereby all candidates have an equal, fair and reasonable opportunity to determine ballot position when petitions are simultaneously filed.

The State Board of Elections must certify candidates, including candidates for group offices, to the County Clerks as required by Section 7-12 of the Elections (Ill. Rev. Stat. 1975, Ch. 46, Par. 7-12). The entire statutory scheme of the Illinois Election Code focuses on petitions in terms of circulation, signatures, filing and certification. Nowhere in the Election Code is there any authority for the State Board of Elections to break up the slates or coalition of candidates as they appear on petitions for nominations.

Additionally, there is no authority to require as a condition of participating in a lottery, candidates on a slate

must waive their right to remain together with other candidates as a group on the ballot. Nor is there any authority that to remain as a group on the ballot, such group candidates must appear on the ballot below candidates filing individual or single petitions.

II.

THE JUDGMENT OF THE ILLINOIS SUPREME COURT IS BASED ON *ESTABLISHED PRINCIPLES OF LAW.*

On January 19, 1976, the Illinois Supreme Court held that Regulation 1975-2 of the State Board of Elections to be constitutional.

In *Huff* v. *State Board of Elections,* 57 Ill. 2d 74 (1974), the Supreme Court of Illinois required that the order of listing candidates on ballots must be determined by a non-discriminatory method. At issue in *Huff* was whether the State Board of Elections' Regulation 1973-2, which provided the same criteria for petitions that are considered to be filed simultaneously, was fair and impartial, and pursuant to the statutory authority granted to the Board. The Court held the regulation to be fair and impartial and within the statutory authority of the Board.

To require slates of candidates to be listed after all candidates participating in the lottery and before all other late filing candidates is to discourage and penalize candidates from forming slates. Further, it would deny these groups equal protection of the laws.

III.

PLAINTIFF'S CONSTITUTIONAL RIGHTS ARE FULLY PROTECTED BY REGULATION 1975-2 OF STATE BOARD OF ELECTIONS AND THE ELECTION STATUTES.

In order to establish a denial of equal protection of the law, under the Fourteenth Amedment to the Constitution of the United States, one must prove the existence of an intentional or purposeful discrimination; one in which one class is favored over another. *Snowden* v. *Hughes,* 321 U.S. 1, 7 and *Bohus* v. *Board of Election Commissioners,* 447 F. 2d 221 (C.A. 7th 1971).

The constitutionality of Regulation 1975-2 of the State Board of Elections was again challenged in the Federal District Court in Illinois in the case of *Baum* v. *Lunding,* 76 C 261 (N.D. Ill. 1976).

In *Baum,* the Plaintiff who is a candidate for Circuit Court judge, requested that: a three-judge court be convened; a declaratory judgment be entered declaring that Regulation 1975-2 of the Illinois State Board of Elections is unconstitutional; and, that an injunction be entered enjoining state and local election officials from assigning ballot positions pursuant to the operation of said Regulation.

The *Baum* court stated:

> "Under § 7-14, Illinois has selected a filing procedure *which enables persons who wish to be listed together* to simply line up at the same time, or in effect, give their voter petitions to one person who would drop them all off at once, in any order, whatever his rank in filing them happens to be. The fact that all names are on one petition, or that an order is specified on that one petition does not enhance this contingency, for the lone person dropping off the petitions could physically hand them to a clerk one at a time, in the order the candidates prescribed to him. Consequently, the fact that a lottery preserves this order cannot be said to be the cause of any discrimination. As a non-discriminatory manner of breaking ties for the time of filing, the lottery merely restates a physical reality which has not been challenged as constitutionally violative." (p. 9)

The District Court denied the motion to convene a three-judge court and sustained the motion to dismiss. The Court held:

> "[T]hat no cognizable discrimination is in fact occurring through the use of the regulation. Consequently, it is unnecessary to determine the presence of either kind of justifying state interest, and no substantial constitutional question has been presented." (P. 9)

And, in considering the effect of a regulation as it relates to ballot position, stated:

> "The remaining equal protection claim to be examined is whether the regulation favors the persons listed at the top of the group, statistically, over individual candidates. For this purpose, the court assumes, even in the absence of clear allegation in either complainat that there may be some advantage to candidates with higher position on the ballot. * * * As to these there is no statistical advantage garnered by the lottery. Each group contains within it persons who have greater and lesser chances of being near the top of the ballot. As against the entire group, however, no individual is disadvantaged statistically. If anything, individuals are pushed to the extreme of the ballot, that is, either to the top or the bottom, on the average, a situation which has elsewhere been characterized as *advantageous.*" (pp. 9-11)

The issues in this cause have been resolved in the Illinois Supreme Court and the United States District Court for the Northern District of Illinois, Eastern Division. Both courts have correctly held that Regulation 1975-2 of the State Board of Elections is not a violation of either the Equal Protection of the Laws or Due Process clauses of the Constitution of the United States. Accordingly, the decision of the Illinois Supreme Court should be affirmed.

CONCLUSION

In view of the foregoing, the Defendants-Appellees respectfully pray that the appeal be dismissed or, in the alternative, that the decision of the Illinois Supreme Court be affirmed.

Respectfully submitted,

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March 12, 1976

APPENDIX

APPENDIX

STATE OF ILLINOIS }
COUNTY OF COOK } SS.

AFFIDAVIT OF SERVICE

I, MICHAEL McCLELLAND, depose and say that I am a clerk in the office of Michael L. Levinson, one of the attorneys of record for FRANKLIN J. LUNDING JR., WILLIAM L. HARRIS, DON W. ADAMS, MICHAEL E. LAVELLE and JAYNE PRICE, Defendants-Appellees herein, and that on March 10, 1976, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Motion To Dismiss Or Affirm on each of the parties required to be served herein, as follows:

On, PAUL BRADLEY, WILLIAM COUSINS, PATRICK J. HUGHES, RONALD C. SMITH, CHARLOTTE ADELMAN, SHELVIN SINGER, Plaintiffs-Appellants herein, by mailing the copies in a duly addressed envelope, with first class postage prepaid, to MELVIN B. LEWIS, counsel of record for said Plaintiffs-Appellants, at his office at 315 S. Plymouth Court, Chicago, Illinois 60604.

STATE OF ILLINOIS
STATE BOARD OF ELECTIONS
REGULATION 1975-2

The lottery system to be used to break ties resulting from the simultaneous filing with the State Board of Elections of petitions for the same office shall be as follows:

1. The names of all candidates who filed simultaneously for the same office shall be listed alphabetically and shall be numbered consecutively commencing with the number one which shall be assigned to the candidate whose name is listed first on the alphabetical list; provided, however, that candidates filing a group petition for the same office shall be treated as one in the alphabetical listing using the name of the first candidate for such office to appear on the petitions as the name to be included in the alphabetical list. For example, if five candidates by the names of Downs, Brown, Edwards, Cook and Adams have filed simultaneously, they will be arranged alphabetically and assigned numbers as follows: Adams, one; Brown, two; Cook, three; Downs, four, and Edwards, five. However, if Cook and Adams filed a group petition and Cook's name appeared first on the petition, then the candidates would be arranged as follows: Brown, one; Cook and Adams, two; Downs, three; and Edwards, four.
2. All ties will be broken by a *single* drawing. A number shall be placed in a container representing each number assigned to each candidate and group of candidates pursuant to the alphabetical listing procedure set forth in paragraph 1 above. For example, if the largest number to be used for any office is five, then numbers one, two, three, four and five will be placed in a container. In this manner, sufficient numbers will be placed in the container to conduct a drawing for all offices at the same time.

3. After the numbers are placed in the container they shall be drawn one at a time from the container after they have been thoroughly shaken and mixed. The candidate or group of candidates in the position on an alphabetical list corresponding to the first number drawn shall be certified ahead of the other candidates listed on the alphabetical list. The candidate or group of candidates in the position on the alphabetical list corresponding to the second number drawn will be certified second and so forth until all numbers have been drawn. For example, where no group petitions were filed, if candidates Adams, Brown, Cook, Downs and Edwards filed simultaneously at 8:00 a.m. on the first day of filing, and the number three is the first drawn, then candidate Cook who is listed in the third position of the alphabetical list, shall be certified first on the ballot. If the number one is drawn second, then candidate Adams, who is listed in the first position on the alphabetical list, shall be certified second on the ballot . . . and so on. For offices where group petitions were filed, using the example set forth above where candidates Cook and Adams file a group petition for the same office, and Cook's name appears first on the petition, and number three is drawn first, then candidate Downs would be listed first. If the number two is drawn second, then candidates Cook and Adams would be certified second and third, respectively. If the number four is drawn third, then candidate Edwards would be certified fourth . . . and so on. In districts with fewer names on the alphabetical list than are in the drawing, then all numbers in excess of the number of candidates or group of candidates that appear on the particular alphabetical list shall be disregarded. Thus, if five numbers are placed in the container, and only four candidates or groups of candidates are on a particular list, then the number five shall be disregarded. In districts with fewer than four names, the numbers four and five shall be

disregarded. In districts with fewer than three names, the numbers three, four and five shall be disregarded. For example, if candidates Adams and Cook filing separate petitions, are the only candidates listed on the alphabetical list and five numbers are chosen in the following order, 3, 5, 4, 2 and 1, then candidate Cook's name will appear in the certification prior to the name of candidate Adams.

4. All candidates shall be certified in the order in which petitions have been filed with the State Board of Elections. In cases where candidates have filed simultaneously, they shall be certified (in the order determined by the lottery procedure outlined above) prior to candidates who filed for the same office who filed their petitions at a later time, except in those situations where the law requires rotation on a district-by-district basis.

Adopted by the Board November 21, 1975.